

---

In the Matter of the Arbitration  
Of a Dispute Between  
INDEPENDENT SCHOOL DISTRICT #2184

And

Gilmore Graduate Credits/Lane  
Advancement Grievance  
BMS Case No. 16-PA-0492

LUVERNE EDUCATION ASSOCIATION

---

APPEARANCES:

Knutson Flynn & Deana, P.A., by Mr. Steven M. Knutson, Attorney at Law,  
appearing on behalf of the District.

Ms. Jess Ann Glover, Staff Attorney, Education Minnesota, appearing on behalf  
of the Association.

**ARBITRATION AWARD**

Independent School District (IDS) #2184, hereinafter the District or Employer, and  
Luverne Education Association, hereinafter the Association, are parties to a collective  
bargaining agreement providing for the submission of grievances to final and binding  
arbitration before an arbitrator selected by them. Hearing in the captioned matter was  
held on April 27, 2016, in Luverne, Minnesota. Thereafter, the parties filed post-hearing  
briefs.<sup>1</sup>

ISSUE:

The parties were unable to stipulate to a statement of the issue to be resolved by the  
undersigned. Thus, the undersigned frames the issue as being:

“Did the District violate the collective bargaining agreement when it denied  
Gilmore’s September 11, 2015, request to advance to the MA+20 lane on the 2015-2016  
Salary Schedule? If so, what is the appropriate remedy?”

PERTINENT CONTRACT LANGUAGE:

ARTICLE IV  
SCHOOL DISTRICT RIGHTS

Section 1. Inherent Managerial Rights: The exclusive representative recognizes that the School District is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure and selection and direction and number of personnel.

\* \* \*

Section 4. Reservation of Managerial Rights: The foregoing enumeration of rights and duties shall not be deemed to exclude other inherent management right and management functions not expressly reserved, and all management rights and management functions not expressly delegated in this Agreement are reserved to the School District.

ARTICLE VIII  
SALARY SCHDULE

\* \* \*

Section 2. Status of the Salary Schedules: The salary schedules shall not be construed as part of a teacher's continuing contract. A teacher's advancement is subject to the right of the School District to withhold increments, lane changes, or other salary increases for good and sufficient grounds. The teacher shall be notified in writing no less than thirty (30) days in advance of the action taken by the School District and the reason for such proposed action. An action withholding a salary increase shall be subject to the grievance procedure pursuant to article XVIII.

Section 3. Placement on the Salary Schedule: The following rules shall be applicable in determining placement of a teacher on the appropriate salary schedule.

---

<sup>1</sup> At the arbitration hearing, the undersigned requested the District and Union to waive the contractual requirement that he issue his decision within 30 days of the close of the hearing or receipt of briefs, and they both agreed to waive that requirement.

Subd. 1. Germane: Credits to be considered for application on any lane of the salary schedule must be germane to the teaching assignment as determined by the School District.

Subd. 2. Grade and Credits: To apply on the salary schedule, all credits beyond a bachelors degree must be graduate credits or credits which are applicable to the teaching field and must carry a grade of B or better. When graduate credits are taken for pass/fail, satisfactory/unsatisfactory, grade achieved must reflect on the positive side for lane movement. All credits must have been given prior approval by the Superintendent in writing.

Subd. 3. Prior Approval: All credits, in order to be considered for application on the salary schedule, must be approved by the Superintendent in writing prior to the taking of the course.

Subd. 4. Effective Dates: Individual contracts will be modified to reflect qualified lane changes twice each year – 1) at the beginning of the school year, providing (sic) an official transcript of qualified credits is submitted to the Superintendent's office no later than September 15 of that year. Credits submitted by an official transcript later than September 15, even though otherwise qualifying, shall not be considered until January 31. 2) effective February 1 of the school year, providing an official transcript of qualified credits is submitted to the Superintendent's office no later than January 31 of that year. Credits submitted after January 31 shall not be considered until the following school year.

Subd. 5. Advanced Degree Program: A teacher shall be paid on the master's degree lane or higher degree lane only if the degree program is to germane to the teaching assignment as approved by the School District and the degree program is approved in writing by the superintendent in advance.

Subd. 6. Payment of Present Salary: The rules contained herein relating to the application of credits on the salary schedule shall not deprive any teacher of any salary schedule placement already recognized.

Subd. 7. Prior Experience: A teacher who has had experience in other school systems or in other fields of endeavor will be placed on the salary schedule as agreed in writing between the School District and the teacher. Teachers returning to the School District shall receive their previously accumulated unused sick days.

Subd. 8. Application: Credits to apply to lanes beyond a particular lane must be earned subsequent to the earning of the degree and must be taken at an accredited college or university as solely determined by the School District.

\* \* \*

BACKGROUND:

On or about June 1, 2014 the grievant, Gilmore, applied for an elementary music teacher position vacancy which the District had advertised with St. Cloud State University. On the resume she attached to her application she indicated that she had earned a BS Degree in “K – 12 Music Education: Vocal and Classroom Music” at Southwest State University in 2001, and had been teaching in Minnesota and South Dakota area schools since 2002. Gilmore testified that the District interviewed her, and present for the District in the interview was former Superintendent, Fisher, the Elementary School Principal, Gillette, and the High School Choir Director. She stated the graduate credits she had earned beyond her BS degree were not discussed, and the only thing stated was that Superintendent Fisher stated that he encouraged employees to earn MA degrees and he would be supportive if she pursued one. She testified that following her interview Elementary Principal, Gillette, offered her the position and she told Gillette she “would get back to her in a couple days”. She testified that she didn't recall if the Elementary Principal told her when she communicated the employment offer or during the interview that the District practice was she could be placed no higher on the salary schedule than Step 7, meaning she would only be granted credit for seven years of prior teaching experience. Gilmore stated that she orally communicated her acceptance of the position to the Elementary Principal who told her that she needed to bring in a copy of her transcript and license to the business manager. She stated that she did as instructed and gave the materials in an envelope to the Business Manager, Mann, who told her she would type up a teaching contract. She testified that about one half hour later, on June 11, 2014, Mann gave her the teaching contract and told her she was being placed on the salary schedule at Step 7 in the BA+10 lane. Gilmore said she signed the contract when it was presented to her by Mann, but that only her salary appeared on the contract, not her lane and step placement which generated that salary. The District School Board Chairperson and District School Board Clerk signed Gilmore's teaching contract on June

26, 2014, but Gilmore never received a copy of the signed contract. She stated that she later received in the mail from the District a copy of the collective bargaining agreement.

Gilmore testified that no one ever told her which 10 of her 17 graduate credits she had earned after receiving her BS degree, and prior to applying for the vacancy, she was given credit for that resulted in the District placing her in the BA+ 10 lane. She stated that she came away from the hiring process believing the District had accepted all 17 of her graduate credits.

On May 14, 2015, Gilmore completed the District's "Graduate Credit Approval Request Form" for a three credit graduate course to be taken in the summer of 2015. Superintendent Fisher approved her request on or about either May 14 or May 19, 2015.<sup>2</sup> On August 21, 2015, at 3:33 PM, Gilmore e-mailed Business Manager Mann stating,

"The item you faxed to Augustana for me today will make me eligible for a lane change. By what day do I need to apply for a lane change, and do I get a form or something from you?"

Mann sent the following reply a few minutes later (3:52 PM):

"We need to have transcripts for all of the graduate credits that you have taken to match with the pre-approval forms on file by Sept 15. There is a form in the office."

On August 24, 2015, at 8:23 AM, Gilmore sent the following e-mail reply to Mann:

"You have all of my transcripts on file for everything except the book study this summer, which we are waiting for from Augie.

Wouldn't you also have a copy of the pre-approved form for the book study? If not, I have a copy that was returned to me, and can get it to you. I will get the required form from you asap, too. I just want to double check and make sure you have my other 17 grad credit transcripts on file, which I gave to you last summer (2014)?"

At 8:59 AM Mann replied to Gilmore's e-mail stating,

"Yes your transcripts are on file. However, to be considered for a lane change their needs to be a prior approval on file for each class. It would be good for you to stop down and visit with Mr. Oftedahl."

Then at 10:03 AM, Gilmore emailed Mann stating:

---

<sup>2</sup> Is not clear from the form in evidence whether Fisher dated it as 5-14-15 or 5-19-15.

“How could I have had prior approval from Laverne when I wasn't here yet? I had prior approval from all of my other supervisors, and my credits were approved for my pay scales in those schools ... Just wondering ...?”

At 8:16 AM on August 25, 2015, Gilmore sent the following e-mail to Oftedahl:<sup>3</sup>

“Below is the thread of messages regarding my question in the hall this morning about a lane change to BA+20. Last year when I was hired I had 17 graduate credits, so was put on the BA+10 salary schedule. There were no questions about my transcripts or prior approval at that time, so I am curious as to why that would come up now. I appreciate your input.”

A little while later, at 9:01 AM, Oftedahl sent the following e-mail to Gilmore:

“With your hire at BA+10, the next 10 credits have to be gained while working for the Laverne District. The district hired you 17 graduate credits, recognizing 10, which placed you on the BA+10 step. This has been the stance of the District for many years. This position has also been backed up through the grievance process.

According to the Master Agreement:

Article VIII Section 3 Subd. 3

All credits, in order to be considered for application on the salary schedule, must be approved by the Superintendent in writing prior to the taking of the course,

and

Article VIII Section 3 Subd. 8

Credits to apply to lanes beyond the particular lane must be earned subsequent to the earning of the degree and must be taking an accredited college or university as solely determined by the School District.”

On August 26, 2015 at 2:38 PM Gilmore sent the following e-mail to Oftedahl and several others

“I was hired in lieu of the earn in June of 2014, with 17 graduate credits to my name. Because lane changes are in increments of 10, it made sense to me that my contract was drawn up at a BA+10. After taking a pre-approved book study this past summer, my number of graduate credits earned went up to 20, so I then sent Marlene an e-mail asking about the steps for a lane change to it BA+20. I was very surprised to learn (through a series of e-mails which you have all been sent) that because I was hired at BA+10, none of my remaining seven graduate credits were being recognized in my quest for a BA+20.

---

<sup>3</sup> Oftedahl was the successor Superintendent to Fisher and started his employment with the District on July 1, 2015.

This letter is being written to state that when I was hired and told that I would be put on the BA+10 salary, there was never any indication that the remaining seven credits were unacceptable to the school district. There was never any mention as to which of those 17 credits were approved or not approved, so I believe that all of my graduate credits had been accepted. No person in the hiring process ever gave any indication that those remaining seven credits would not apply in the future or be applicable to a BA+20.

I would also like it to be known that for each of the 17 graduate credits earned before being hired in Laverne, I had prior approval from the school districts in which I was teaching (Tracy, MN and Watertown-Mayer, MN). All of my credits are pertinent to my subject of music education, and I earned all A's and one B.

Before I took the three credit graduate classes past summer, I filed all the district protocols for pre-approval, turned in all the necessary forms, and filed the proper time-frame. In good faith they took the summer class, believing that my previous graduate work had been accepted among be recognized in the future when applying for a BA+20. As I have said, there was absolutely no mention the hiring or contract signing process that any of my graduate credits were not accepted or recognized by the LaVerne school district; I understood that I was being paid for just 10, because I had not yet reached 20.

In light of this information, I believe that I should be eligible for a lane change from the BA+10 to the BA+20.”

On September 2, 2015, Gilmore e-mailed Oftedahl again stating

“Since I have not received a response, I was wondering if you had received the message below, which I sent last week. I am still wondering of my lane change be granted. Please let me know.”

Later that day Oftedahl e-mailed Gilmore,

“I did send a response, but it may be in cyberspace somewhere. I will send a copy of my response in inter-school mail. Sorry for the delay.”

On September 3, 2015 Gilmore e-mailed Oftedahl stating:

“I did receive the response to my first e-mail (dated August 25th), which you have sent me through inter--school mail. However, I never received a response to the letter in the e-mail below dated August 26, 2015 2:38:15 PM CDT”

There is no record evidence of any additional email correspondence between Oftedahl and Gilmore prior to Gilmore, on September 15, 2015, filing a District “Lane Change Request Form” requesting that she be placed in the BA+20 lane on the 2015-2016 Salary Schedule “A”.

Fisher, District Superintendent when Gilmore was hired, testified that he was aware that she had 17 graduate credits when she was hired. He also stated that all 17 credits were germane to her teaching assignment and qualified her for placement on the salary schedule at the BA+10 lane. He said he communicated to the Elementary Principal, Gillette, that Gilmore's placement would be in the BA+10 lane and the Principal communicated the offer of employment to Gilmore. When asked on cross-examination whether he discussed with Gilmore or put in writing anything about her graduate credits he replied, “we did recognize some credits earned prior to coming to the District and didn't do the BA+20 lane because she hadn't finished the 20 credits”. Fisher also stated that he agreed with Gilmore's testimony that he had said to her during the interview “he encourages staff to get a masters degree, but didn't say anything to her about the additional credits”. He also testified that he could not say when Gilmore was given a copy of the collective bargaining agreement, but that the District gave new hires a copy of the collective bargaining agreement after they had signed their individual teaching contract. He also testified that Gilmore would not have known which of her graduated credits had been accepted for the BA+10 lane placement, and that the additional seven graduate credits had not been approved for future lane advancement.

The District's denial of Gilmore's request to be advanced to the BA+20 lane was grieved, processed through the grievance procedure, and brought on for hearing before the undersigned.

#### DISCUSSION:

It is not disputed that when the District hired Gilmore in 2014 she had already earned 17 graduate credits that were germane to her teaching assignment receiving a grade of “B” or better, which are contractual requirements that must be satisfied in order for those credits to be able to be used for lane advancement on the salary schedule. Article VIII, Section 3 of the parties' collective bargaining agreement sets forth the rules governing “placement on the salary schedule”. Placement on the salary schedule is made up of two components – years of teaching experience (experience step placement) and level of education attainment (lane placement). The District asserts that the language of



Article VIII, Section 3 “clearly and unambiguously” provides that all credits must be pre-approved by the Superintendent in writing before taking the course.

The record evidence establishes that Article VIII, Section 3 dates back to at least the 1975-1977 collective bargaining agreement and, for the most part, the language has remained unchanged up to and including the parties’ current 2015-17 agreement. There was no evidence adduced of the bargaining history leading to the parties’ agreement to include this language in their contract. There is record evidence that at least one substantive change was made to the 1975-77 Article VIII, Section 3 language. Sometime after the parties’ 1977-78 contract, and at least by their 1985-87 contract, Subd. 7. Prior Experience was modified to eliminate the sentence that read, “The teachers shall be given credit for up to seven years of teaching experience.” That sentence prohibited the District, when hiring any teacher who had prior teaching experience, from giving that teacher credit for more than seven years of prior teaching experience and placing the teacher any higher than Step 7 on the salary schedule. Thus, even though that restriction was no longer in place when Gilmore was hired, she was told that the District had a practice of not granting any new teacher more than 7 years of prior teaching experience for placement on the salary schedule. Her initial placement at Step 7, based upon her more than 12 years of teaching experience, is not disputed.

Article VIII, Section 3 also contains rules regarding graduate credits used for determining lane placement and advancement on the salary schedule. Article VIII, Section 3 Subd. 1 requires that the graduate credits “must be germane to the teaching assignment”. Subdivision 2 requires that “all credits beyond a bachelors degree must be graduate credits or credits which are applicable to the teaching field and must carry a grade of B or better”. Subd. 8 provides, “credits to apply to lanes beyond a particular lane must be earned subsequent to the earning of the degree and must be taken at an accredited college or university”. Superintendent Fisher testified, and the District stipulated, that Gilmore's 17 graduate credits met/satisfied those requirements of subdivisions 1, 2 and 8 of Article VIII, Section 3.

Article 8, Section 3, Subd. 2 also provides, “all credits, in order to be considered for application on the salary schedule, must be approved by the Superintendent in writing

prior to the taking of the course”. It seems clear that the parties’ intent in agreeing to that sentence was not to have it applied in the case of teachers being hired into the District who had already earned graduate credits, because prior approval in such a case would be an impossibility. And, in this case, the District obviously did not apply the requirement to Gilmore’s graduate credits, as evidenced by Fisher’s decision to place Gilmore in the BA+10 lane based upon the graduate credits she had already earned by the time she was hired.

This dispute in this case arose because Superintendent Oftedahl, Fisher’s successor, denied Gilmore’s request to advance to the BA+20 lane after having successfully completed a 3 credit course with a grade of B for which she had sought Fisher’s prior approval, and which he had approved on May 15, 2015. The District asserts that neither Fisher nor Oftedahl ever gave Gilmore written approval for her to apply the 7 graduate credits she had earned, in addition to the 10 credits the District approved to place her in the BA+10 lane, toward future advancement to lanes beyond the BA+10 lane.

There are two subdivisions contained in Article VIII, Section 3 that address the issue of prior approval of credits to be used for lane advancement. Subdivision 2, titled “Grade and Credits”, states “all credits must have been given prior approval by the Superintendent in writing”, and subdivision 3, titled “Prior Approval”, states that “all credits, in order to be considered for application on the salary schedule must be approved by the Superintendent in writing prior to the taking of the course”. Clearly, the language in those subdivisions requires a teacher to have received “prior approval” to take a graduate credit course before taking the course, if the teacher intends to apply the course toward lane advancement on the salary schedule. Obviously, this is a reasonable requirement inasmuch as the course must be “germane” to the teaching assignment, as determined by the District, in order to be eligible to apply toward lane advancement; and prior approval eliminates the potential for disputes to arise after a teacher has invested the time and money in taking the course only to find out later that the District does not consider the course to be germane to his/her teaching assignment.

Equally as clear, however, is that a teacher who is not an employee of the District would not be seeking the District’s prior approval for graduate credit courses that were

taken when the teacher, like Gilmore, was teaching in another district in another state. Thus, the plain meaning of the Article VIII, Section 3 language requiring “prior approval” to take graduate credits for lane advancement on the salary schedule is inapplicable to a teacher in Gilmore’s situation and, thus, cannot be relied upon to foot the District’s denial of Gilmore’s September 14, 2015, lane advancement request that she be placed in the BA+20 lane for the 2015-16 school year.

Furthermore, if the parties had intended to address the issue of approval for graduate credits earned prior to being hired by the District in their collective bargaining agreement they could have done so, just as they did in the 1975-77 collective bargaining agreement with regard to teachers being hired into the District with prior teaching experience. In that Agreement they included language in Article VIII, Subd. 7 agreeing that a teacher with prior teaching experience when hired by the District could not be given credit for more than seven years of that prior teaching experience. Clearly, they chose not to do so with respect to graduate credits earned prior to a teacher’s employment by the District.

The District also argues if the undersigned concludes the language of Article VIII, Section 3 does not support its denial of Gilmore’s request for lane advancement because all of her 17 graduate credits were not approved in writing at the time of her hire, then alternatively, it asserts that Oftedahl acted in accordance with the District’s consistent and long-standing practice in denying Gilmore’s lane change request. It contends, given that a teacher cannot realistically be given pre-approval by the Superintendent for graduate credits earned prior to the time of the teacher is hired, the District has long engaged in the practice of considering pre-hire graduate credits brought to its attention at the time the teacher is hired. In order to be applied for purposes of initial placement on the salary schedule, or to be considered for subsequent lane advancement, pre-hire graduate credits must have been recognized, in writing, by the Superintendent, at the time of hire. That is to say, pre-hire credits, which are not so recognized, will not be considered for purposes of lane advancement.

Claims that a past practice is alleged to evidence an implied term and/or condition of employment in an area in which the collective-bargaining agreement is silent, as

herein, have been considered by arbitrators for more than 60 years. During that time, arbitrators have overwhelmingly and consistently held that the party asserting such a past practice has the burden of proving that the past practice represents an implied agreement by mutual conduct. Arbitrators have also long held that that in the absence of a written agreement for a practice to be binding upon both parties it must be unequivocal, clearly enunciated, acted upon and accepted by both parties. In other words, because an arbitrator is being asked to conclude, in the absence of contract language, that a practice has become an implied term of the parties' collective bargaining agreement, there must be evidence of "mutuality". That is to say, by their conduct, the parties have mutually acquiesced to the past course of conduct/practice. And, the Minnesota Supreme Court in *Ramsey County v. AFSCME*, 309 N.W. 2d 785 (Minn. 1981) concluded that mutuality, among other factors, must be established for there to be a finding of a binding past practice.

Because there must be evidence of mutuality in order to for any practice to be deemed sufficiently binding such that it has become an implied term of the parties' collective bargaining agreement, first and foremost, there must be proof of mutuality regarding the alleged practice. In this case, there is no record evidence establishing that the Union had knowledge of the District's treatment of teachers' pre-hire graduate credits, i. e. either approving in writing or denying a teacher the ability to apply earned graduated credits at the time of hire that otherwise satisfy the requirements of Article VIII, Section 3 qualifying them to be used for future lane advancement, and the reasons why. There is no record evidence of Union involvement in the pre-hire interview process or that it otherwise made aware of those discussion, if any, that took place during the interview process. Clearly, without being privy to whatever decisions the District made at the time of hire regarding previously earned graduate credits it could not possibly have acquiesced in or agreed with the District's decision(s) regarding prior approval or non-approval that the District insists has to occur at the time of hire.

Additionally, there is not sufficient record evidence to support a finding that the Union has acquiesced in the District's alleged practice. To the contrary, there is record evidence the Union has previously challenged the District's treatment of graduate credits earned prior to being hired in the District. The Employer advanced the case of teacher

Nelson's as evidence of the existence of the alleged long standing past practice. But, Nelson's case also points to the absence of any "mutuality" underlying the alleged practice. Nelson was denied lane advancement on the salary schedule after his hire because he had not received prior written approval from the Superintendent when he was hired of all of his graduate credits upon which he based his lane change request. Nelson and the Union grieved the District's denial of his lane change request. The District's denied his request for lane advancement because he had not obtained prior approval at the time of his hire for one course's credits that was included in his request, without which he would not have had sufficient credits to advance on the salary schedule. That grievance was submitted to arbitration and arbitrated. In the written Award, the arbitrator in that case wrote that Superintendent Fisher had testified his predecessor had denied approval of Nelson's 1982 NSU Administration course as not being germane to his teaching assignment.<sup>4</sup>

And, most importantly in the Nelson grievance the Union raised the same arguments it raises in this case – that it was impossible for Nelson to gain prior approval of the graduate course before it was taken, and also that the District did not advise Nelson when he was hired that it was not approving the graduate credit for purposes of future lane advancement. Clearly, that is evidence that the Union has not acquiesced/accepted the alleged past practice the District is relying on herein to support its denial of Gilmore's application to use the 7 credits for lane advancement. Thus, the record evidence does not support a conclusion that the Union has tacitly or otherwise agreed to what the District claims is a past practice supporting its denial of 7 of Gilmore's graduate Credits she had earned prior to being hired by the District. Consequently, the District has not proven the existence of "mutuality" footing the alleged practice, which is an essential prerequisite to a finding of a binding past practice, even it could establish it had followed a course of conduct that is readily ascertainable, and clearly enunciated and acted upon over a reasonable period of time as a fixed and established practice. Therefore, the undersigned is persuaded that there was not a binding and enforceable past practice that rose to the

---

<sup>4</sup> The arbitrator did not reach the merits of that grievance because he concluded the grievance was procedurally time barred from his consideration.

level of an implied term of the parties' collective bargaining agreement upon which Oftedahl could rely in denying Gilmore's request for advancement to the BA+20 lane.

The District also argues that if the undersigned finds that the master agreement is silent regarding the prior approval of a teacher's graduate credits earned prior to being hired by the District then it is free to act unilaterally. It argues the District surrendered to collective bargaining the issue of advancement on the salary schedule for teachers who have earned germane, pre-approved graduate credits. However, to the extent that pre-hire graduate credits are not specifically addressed in the master agreement, the parties have not explicitly negotiated the rare case of a teacher wishing to use such pre-hire graduate credits towards advancement on the salary schedule, and the Union is trying to get through grievance arbitration that which it might more appropriately seek at the bargaining table. It contends that if the master agreement is silent then the District must be free to determine how these credits are treated.

Thus, the District is contending that Article IV, School District Rights, Section 4 of the contract preserves its managerial discretion to approve or deny at the time of hire a teacher's previously earned graduate credits for application toward future lane advancement after being hired. However, it is also the case that in exercising its management discretion an employer must act reasonably, not arbitrarily, and cannot abuse the exercise of its discretion. In this case, the District would have me conclude that Fisher only approved seven of Gilmore's 17 graduate credits at the time she was hired. But, the record evidence is that Fisher never discussed, nor is there any evidence that Gillette, the Elementary School Principal who was present in the interview, but not called to testify, ever raised the issue with Gilmore. Rather, Fisher merely instructed Gillette to offer Gilmore a contract placing her in the BA+10 lane at Step 7 because, as he testified, she had not yet earned 20 graduate credits allowing placement in the BA+20 lane. As Gilmore testified, she came away from her interview believing that Fisher had accepted all 17 of her graduate credits. In the undersigned opinion, in the light of the record evidence, it was reasonable for Gilmore to draw such an inference from Fisher's conduct of her interview when her graduate credits were not even discussed. Fisher testified that he was aware Gilmore had 17 graduate credits, and clearly he would have had no other basis for instructing Gillette to offer Gilmore a contract that placed her in the BA+10

lane. Just as clear is that with all of his years of experience in the education field as a building principal and superintendent there can be no doubt he was aware of the possibility Gilmore would be taking additional graduate credits after being hired by the District, and that she would want to apply the seven credits she had already earned toward future lane advancement. Because Fisher did not discuss with Gilmore during the interview her graduate credits, yet instructed the Gilmore to offer Gilmore a position at Step 7 in the BA +10 lane it was reasonable for Gilmore to infer her from salary schedule lane placement and Fisher's silence regarding her graduate credits that he had approved all of her credits for her to use going forward, not just 17 of those credits.

Were Fisher not intending to approve all 17 of Gilmore's credits in the exercise of his management discretion he was obligated to, at a minimum, have discussed with her which credits he was not approving for future use toward lane advancement and why. Instead, he chose to arbitrarily ignore the issue, have no discussion at all with Gilmore regarding the 17 credits or any portion thereof. Indeed, in the undersigned's opinion, a reasonable person reviewing the facts surrounding Fisher's interview of Gilmore would conclude that Fisher, in fact, acted arbitrarily in not even discussing with Gilmore her graduate credits. And, his conduct evidences implicit approval of Gilmore's use of seven graduate credits not used in the District's determination of her initial salary schedule placement in the BA+10 lane for lane advancement after being hired. Moreover, in the undersigned opinion, it is disingenuous for Fisher and the District to now assert, a year and one-half after Gilmore's interview where he did not discuss with Gilmore her graduate credits that by his conduct he had not approved all 17 of her graduate credits for use toward future lane advancement; and now claiming those 7 credits can still be used in attaining a Masters Degree. This is particularly so when there was testimony that it would be up to whichever masters degree program she entered, not the District, which, if any, of her 17credits could be used in attaining a Masters degree.

The record evidence persuades the undersigned that Fisher never exercised management discretion to deny Gilmore's use of 7 of her 17 graduate credits for lane advancement on the salary schedule subsequent to her being hired. The written teaching contract that Gilmore signed does not establish such disapproval, particularly inasmuch as Fisher testified he could not place Gilmore in the BA+20 lane because she had not yet

earned 20 graduate credits and could only be placed in the BA+10 lane. The written teaching contract that Gilmore signed certainly evidences nothing more than Gilmore was placed in the BA+10 lane because that was the lane, as Fisher testified, that was the closest advanced salary schedule lane placement that her 17 graduate credits warranted. It is certainly not evidence of a denial of approval for application of 7 of her graduate credits toward future lane advancement after she became a District employee. And, in the undersigned opinion a reasonable inference to be drawn from Fisher's conduct is that he did approve all 17 of her credits and necessarily, therefore, 7 of her 17 graduate credits that were not used to place her in the BA+10 lane could be applied to lane advancement after she was hired.

Furthermore, the undersigned is persuaded that by conducting the interview in the manner that he did and not discussing Gilmore's credits with her if he was intending to approve no more than 10 of her credits and deny approval for her to use seven of those credits toward lane advancement on the schedule if she accepted his offer, he denied her relevant and necessary information to her deliberation of whether to accept the position offered. A reasonable person with 17 graduate credits having been told that she would not be placed at the BA+20 lane because she had not yet earned 20 graduate credits would reasonably assume that upon completion of three more credits once employed in the District she would have enough credits to advance to the BA+20 lane. The District argues the burden is on the teacher applicant to inquire about previously earned graduate credits. However, because Fisher never discussed with her the graduate credits she had earned, yet offered her initial placement in the BA+10 lane, there would be no reason for her to raise the subject. And, because the District did not provide her a copy of the collective bargaining agreement until after she had signed her individual teaching contract she would have no reason to know about the contractual pre-approval language. As discussed Fisher's conduct, in the undersigned's opinion would lead any reasonable person to conclude he had approved all of her graduate credits, not just 10 of them.

For all of these reasons the undersigned is persuaded that Fisher acted arbitrarily in not discussing with Gilmore her 17 graduate credits when he interviewed her for employment and, thus, abused his management discretion granted in Article IV, Section 1 and 4 of the collective bargaining agreement.



Based upon the testimony, exhibits and argument the undersigned enters the following

**AWARD**

The District violated the collective bargaining agreement when it denied Gilmore's September 11, 2015, request to advance to the MA+20 lane on the 2015-2016 Salary Schedule. Therefore, to remedy this contractual violation the District shall

1. Immediately place Gilmore at her appropriate experience Step in the BA+20 lane on the 2016-17 collective bargaining agreement salary schedule.
2. Make her whole for any lost wages and benefits in calendar years 2015 and 2016 that were the consequence of the its denial of Gilmore's 2015 request to be advanced to the BA+20 lane for the 2015-16 school year.

The undersigned will retain jurisdiction for 60 calendar days from the date of this award to resolve any disputes that might arise regarding implementation of the remedies ordered herein.

Dated this 14<sup>th</sup> day of September 2016.

*Thomas L. Yaeger*

Thomas L. Yaeger

Arbitrator